87-1633

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

SIKORSKY AIRCRAFT DIVISION,
UNITED TECHNOLOGIES CORPORATION,
Petitioner,
VS.
THERESA KLOSS, LORI K. UTSINGER,
Individually and as Guardian Ad Litem for
JOHN FRANCIS UTSINGER, a minor, and
AIMEE MAY UTSINGER.

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JAMES M. DERR, ESQ.
BELCHER, HENZIE & BIEGENZAHN
333 South Hope Street,
Suite 3650
Los Angeles, CA 90071-1479
(213) 624-8293
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

APP

QUESTIONS PRESENTED

Whether a California State Court may exercise concurrent jurisdiction over a DOHSA action after *Offshore Logistics, Inc. v. Tallentire* (1987) 477 U.S. 207, 91 L.Ed.2d 174, when California's wrongful death statute has been held to have no applicability to deaths occurring on the high seas.

Whether a State that declined to exercise jurisdiction over claims for deaths of its citizens on the high seas prior to the enactment of DOHSA, and which has continued to recognize that its wrongful death statute has no effect on the high seas, may exercise concurrent jurisdiction subsequent to this Court's holding in *Offshore Logistics, Inc. v. Tallentire* (1987) 477 U.S. 207, 91 L.Ed.2d 174.

PARTIES TO THE PROCEEDING

The following is a list of the subsidiaries and affiliates.

SUBSIDIARIES AND AFFILIATES OF UNITED TECHNOLOGIES CORPORATION

Name	State or Country of Incorporation
AAC-Westland Limited	United Kingdom
AMBAC S.p.A.	Italy
Ancensores Angulo S.A.	Spain
Ansensores y Montacargas Eguren S.A.	Peru
Armorlift S.A.R.L.	France
Ascendes S.A.	Luxembourg
Ascenseurs Clerebout S.A.	Belgium

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Name	State or Country of Incorporation
Ascenseurs Gendre Otis S.A.	Switzerland
Ascenseurs J. Camus	France
Ascenseurs Menard S.A.	France
Ascenseurs W. Sangalli S.A.	France
Ascensores Otis de Venezuela C.A.	Peru
Ascinter-Otis S.A.	France
Bec Air S.A.	France
Caricor Ar Condicionado e Refrigeracao do Brasil Ltda.	Brazil
Carlo Eisner S.p.A.	Italy
Carrier Air Conditioning (Holdings) Limited	New South Wales
Carrier Air Conditioning (New Guinea) Pty. Limited	New Guinea
Carrier Air Conditioning Egypt, Ltd.	Egypt
Carrier Aircon Limited	India
Carrier Experts Service (Central Maylasia) Sdn. Bhd.	Malaysia
Carrier Forsaljnigs Aktiebolag	Sweden
Carrier Higashi-Chugoku Co., Ltd.	Japan
Carrier International of Bahrain, E.C.	Bahrain
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Carrier Nishi Chugoku Co. Ltd.	Japan

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Carrier Saudi Service Company	Saudi Arabia
Carrier Services Management Pty. Limited	New South Wales
Carrier Taiwan Co., Ltd.	Taiwan
Carrier-U.K. Distribution Limited	United Kingdom
Carter Wind Systems, Inc.	Texas
CEAM Lazio Sud	Italy
CEAM Servizi Adriatica	Italy
CEAM Servizi Firenze	Italy
CEAM Servizi Marenna	Italy
CEAM Servizi Milano	Italy
CEAM Servizi Tirrenica	Italy
CEAM Servizi Torino	Italy
China Tianjin Otis Elevator Company, Ltd.	China
Clymalynx A.G.	Lichtenstein
Companhia Eletromecanica	Brazil
COMPORTEL, S.A.R.L.	Portugal
Daewoo Carrier Corporation	Korea
Daewoo-Sikorsky Aerospace, Ltd.	Korea
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Diavia S.p.A.	Italy
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Dynamic Turbocharger Services Pty. Limited Ltd. (Queensland)	Australia

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Name	State or Country of Incorporation
Dynamic Turbocharger Services Pty. Limited Ltd. (Victoria)	Australia
E. H. Industries Limited	United Kingdom
Eddy Current Testing (Pte.) Ltd.	Singapore
ELEMA S.A.	Spain
Elevadores Canarios S.A.	Spain
Elevadores en Servicio, S.A. de C.V.	Mexico
Elizondo, S.A. de C.V.	Mexico
Entalpia S.A. de C.V.	Mexico
Entrol Systems Sdn. Berhad	Malaysia
Essener Aufzugsfabrik Bruno-Haack G.m.b.H.	West Germany
Essex Electricas Industriales, S.A. de C.V.	Mexico
European Aerospace Company, N.V.	Belgium
FES, Inc.	Pennsylvania
Flohr-Otis Aufzuege G.m.b.H.	West Germany
Freissler Otis G.m.b.H.	Austria
Frimar S.r.L.	Italy
Gate France S.A.	France
Gate S.p.A.	Italy
GEAT Gesellschaft fur Angewandte Technologie G.m.b.H.	West Germany
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Grimm-Carrier Ltd.	Thailand
Guide Rails Pty. Ltd.	Australia
Hamilton Standard Limited	United Kingdom
Hamilton Standard Stock B.V.	Netherlands
Hebo Fordertechnik G.m.b.H.	West Germany
Heli-Europe Industries Limited	United Kingdom
IAE International Aero Engines A.G.	Switzerland
Industrial Electrical Specialties, Inc.	Illinois
Insulation Systems and Machines Ltd.	United Kingdom
Insulation Systems Isola Ltd.	Switzerland
Internacional de Climatizacione S.A.	Spain
International Fuel Cells Corporation	Maryland
Isola Essex AG	Switzerland
Isolants Nord Afrique S.A.	Algeria
Keihin Sobi Kabushiki-Kaisha	Japan
Lakshmanan Isola Ltd.	India
Link-Carlyle Ltd.	Thailand
Manufacturas Especializadas, S.A.	Mexico
Mecanismos Auxiliares Industriales, S.A.	Spain

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Microtecnica S.p.A.	Italy
Monitor SNC	France
Mostek France S.A.R.L.	France
National Trading Corporation S.A.L.	Lebanon
Nippon Otis Elevator Company	Japan
Normalair-Garrett (Holdings) Limited	United Kingdom
Otis Elevator Company	Kuwait
Otis Elevator Company	India
Otis Elevator Company Limited	South Africa
Otis Elevator Company S.A.E.	Egypt
Otis Elevator Company S.A.L.	Lebanon
Otis Elevator Saudi Arabia Ltd.	Saudi Arabia
Otis Europe S.A.	France
Otis Maroc S.A.	Morocco
P&WC Aircraft Services (A'Asia) Pty. Ltd.	Australasia
Parker Electronics, Inc.	Delaware
Pernas Otis Elevator Company Sdn. Bhd.	Malaysia
Phoenix Travel (Yeovil) Limited	United Kingdom
Prato Ascensori	Italy
Pratt & Whitney Canada Inc.	Canada
Pratt & Whitney S.A.R.L.	France
Precilec S.A.	France

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Q-Carrier (B) Sendirian Berhad	Brunei
Ratier-Figeac	France
Ratier-Forest/G.S.P.	France
S. P. Electronics S.p.A.	Italy
SAFI-CONEL S.p.A.	Italy
Samico S.A.R.L.	France
Samsung-United Aerospace Co. Ltd.	Korea
SARI Otis (Gestion), S.A.	France
SARI Otis (Maintenance), S.A.	France
Shanghai Tong Hui Carrier A/C Equipment Co. Ltd.	Taiwan
Shenzhen Carrier Service Company	Taiwan
Sito Realty Company, Inc.	Philippines
Societe de Connecteurs de Decazeville, S.A.R.L.	France
Societe Nationale d'Etude et de Construction de Moteurs d'Aviation	France
Societe Offranvillaise de Technologie, S.A.	France
Societe Rhodanienne Ascenseurs e Monte-Charge	France
SODICA S.A.	France
Springer Carrier do Nordeste S.A.	Brazil

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Name	State or Country of Incorporation
Springer Carrier S.A.	Brazil
Steelweld S.A.R.L.	France
Stephen Howe Limited	United Kingdom
Stigler Otis, S.p.A.	Italy
Tampereen Talohissi Oy	Finland
Tatung Otis Elevator Company	Taiwan
Telefunken electronic G.m.b.H.	West Germany
The Belton Corporation	Delaware
Trevino Transporte S.A. de C.V.	Mexico
Turbine Overhaul Services Pte. Ltd.	Singapore
Turborreactores, S.A. de C.V.	Mexico
U.D.D.-F.I.M., S.A.	France
United Technologies Automotive Italia, S.p.A.	Italy
United Technologies Gate Espana S.A.	Spain
United Technologies International Operations (Nigeria) Ltd.	Nigeria
United Technologies Saudi Arabia, Ltd.	Saudi Arabia
UT Insurance Company, Ltd.	Bermuda
UTG-United Technologies Grundig G.m.b.H.	West Germany
Val-Lift S.A.	Switzerland
Valmet Otis Oy	Finland

SUBSIDIARIES AND AFFILIATES OF UNITED TECHNOLOGIES CORPORATION

Name	State or Country of Incorporation
Vegotrans B.V.	Netherlands
Westland Finance Inc.	United States
Westland plc	United Kingdom
Zardoya Otis, S.A.	Spain

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES

Rules

Statutes

No. .....

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

SIKORSKY AIRCRAFT DIVISION, UNITED TECHNOLOGIES CORPORATION, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on December 16, 1987.

OPINIONS BELOW

The Order Denying Review of the Supreme Court of the State of California is unreported and is printed in Appendix A hereto, *infra,* page A-5. The Order of the Court of

Appeal denying Petitioner's Petition for Writ of mandate is printed in Appendix A hereto, *infra,* page A-4. The Order of the Superior Court for the County of Orange denying Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction is printed in Appendix A hereto, *infra,* page A-1.

JURISDICTION

The Order of the Superior Court for the County of Orange denying Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction was entered on July 2, 1987 (Appendix A, *infra,* page A-1). A timely Petition for a Writ of Prohibition and/or Mandate was denied by the Court of Appeal, 4th District, Division 3 on September 18, 1987 (Appendix A, *infra,* page A-2). A Petition for Writ of Prohibition and/or Mandate was filed with the Supreme Court of the State of California on October 9, 1987. On October 15, 1987, the Supreme Court of the State of California ordered said Petition transferred to and decided by the Court of Appeal, 4th District (Appendix A, *infra,* page A-3). On September 13, 1987, a timely Petition for a Writ of Prohibition and/or Mandate was denied by the Court of Appeal (Appendix A, *infra,* page A-4). On November 15, 1987, a timely Petition for Hearing was filed in the Supreme Court of the State of California, and the Order of that Court denying review was entered on December 16, 1987 (Appendix A, *infra,* page A-5). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This Petition involves the Treaty of Guadalupe Hidalgo (February 2, 1848, 9 Stat. 922). This treaty is lengthy. A citation to the treaty is provided at this point, and the

pertinent text is set forth in the Appendix hereto (Sup.C.R. 21(f)). (Appendix p. A-6)

This Petition also involves the following statutes, Executive Orders, and official documents:

(a) Act of Congress, September 9, 1850, § 3 (Appendix p. A-8);

(b) Act of March 2, 1897 (Appendix p. A-9);

(c) Executive Order 6897, November 7, 1934 (Appendix p. A-10);

(d) April 20, 1935 correspondence from W. W. Tarrant, Rear Admiral, USN, to Los Angeles County Recorder (Appendix p. A-11); and,

(e) California Code of Civil Procedure § 377 (Appendix p. A-13).

Each of the foregoing are set out fully in the Appendix hereto.

STATEMENT OF THE CASE

On the morning of June 1, 1984, elements of the United States Navy and Marine Corps were engaged in combined sea and air exercises in the waters off San Clemente Island. A CH-53E helicopter, manned by a crew of four Marines which included Plaintiffs' decedents, had just lifted a five ton military truck from the deck of the U.S.S. Denver for transport to a designated landing zone on San Clemente Island when the helicopter crashed into the Pacific Ocean near the ship, killing all four crew members aboard. San Clemente Island is approximately 21 miles from the nearest point of Santa Catalina Island, and is

approximately 56 miles from the nearest point on the California mainland.[1]

On May 31, 1985, the heirs of certain of the decedents commenced an action in the Superior Court for the State of California, for the County of Orange, seeking recovery for the claimed wrongful death of Plaintiffs' decedents.

Paragraph 16 of the Complaint alleged as follows:

> "As a direct and proximate result of the conduct of Defendants [including petitioners], and each of them, said helicopter and truck fell into navigable waters two-and-one-half miles off the coast of San Clemente Island, thereby resulting in the deaths of decedents . . . " [Emphasis added].

Named as defendants in the action were, among others, Sikorsky Aircraft Division, United Technologies Corporation ("Sikorsky"), and TransTechnology Corporation ("TransTechnology"). Sikorsky manufactured the subject helicopter and certain of its component parts. TransTechnology manufactured the pendant, hook, and sling assembly used to lift the truck. Also named as a defendant in the action was A.M. General Corporation ("A.M. General"), the manufacturer of the truck that was being carried by the helicopter at the time of the crash. Although A.M. General was served with summons and complaint, it subsequently commenced bankruptcy proceedings, and this action has therefore been stayed with respect to that party (11 U.S.C. § 362).

Sikorsky and TransTechnology brought a motion to dismiss the action on the grounds that the California

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[1]Pursuant to Fed.R.Evid. 201, this Court is respectfully requested to take judicial notice of these geographical distances (*U.S. v. Cardona*, 524 F.Supp. 45 (W.D. Tex., 1981).

courts lacked subject matter jurisdiction over admiralty claims which were cognizable solely in United States District Court. The Motion to Dismiss was based on the following grounds:

(a) The crash allegedly occurred in the Pacific Ocean at a point two and one-half miles from the shoreline of San Clemente Island.

(b) San Clemente Island was ceded by Spain to the United States of America by the Treaty of Guadalupe Hidalgo.

(c) San Clemente Island was specifically excepted from the Congressional grant of Statehood that created the State of California.

(d) The State of California has never had any right, title, or interest in San Clemente Island.

(e) Said crash occurred in the Pacific Ocean more than three miles from the nearest point of land which is part of the territory of the State of California.

(f) Therefore, the crash occurred in federal territorial waters surrounding an island which is the property of the United States of America.

(g) California's wrongful death statute, Code of Civil Procedure § 377, has been held inapplicable to deaths occurring in the Pacific Ocean more than three nautical miles from California.

(h) Plaintiffs' exclusive remedy in an action arising from deaths occuring at sea outside California territorial waters is the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 763 *et seq.*

(i) Federal district courts are granted exclusive jurisdiction over DOHSA claims arising from deaths occurring at sea outside California territorial waters.

(j) Therefore, respondent court lacked subject matter jurisdiction over the instant action, and the demurrer should be sustained.

The Motion to Dismiss also addressed the impact of this Court's recent opinion in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986). Sikorsky's contention (discussed in detail below) was that *Tallentire* recognized that § 7 of DOHSA contituted a *jurisdictional savings* clause with respect to those state courts that had previously exercised jurisdiction over deaths occurring on the high seas. However, inasmuch as California courts had refused to extend the reach of California Code of Civil Procedure § 377 to the waters of the Pacific Ocean more than 1 marine league from shore (*Gordon v. Reynolds*, 187 Cal.App.2d 472, 10 Cal.Rptr. 73 (1960)), there was no jurisdiction to "save," and hence, no concurrent subject matter jurisdiction to entertain DOHSA actions.

The Superior Court denied the Motion, without specifying the grounds or reasons for said denial. Likewise, the Petitions for Writs of Mandamus and Petition for Hearing in the Supreme Court were summarily denied. Neither the Appellate Court nor the Supreme Court specified the reasons for the denial.

REASONS FOR GRANTING THE WRIT

This Petition presents important issues of subject matter jurisdiction in two respects. First, it is apparent that this Court's opinion in *Tallentire* is being read more expansively than the language of that opinion or the

underlying legislative history would permit. Secondly, there is the question of whether California, or any other State, can exert its jurisdiction and apply its body of law to the waters around an island lying in the Pacific Ocean far from the territory of that State, especially where that island is owned and controlled exclusively by the federal government and has been dedicated to military and navigational purposes.

The need for review by this Court at this time is particularly acute with respect to the first issue. If *Tallentire* is given the expansive reading apparently adopted by the California courts, both this Court and the Congress will have enacted and interpreted a statute in such a way as to *create* and *impose* wrongful death jurisdiction on a State whose Legislature has declined to create such jurisdiction and whose courts have previously uniformly refused to exercise jurisdiction. Given that prior uniform refusal to exercise extraterritorial wrongful death jurisdiction, it is apparent that California's courts are viewing *Tallentire* as a *mandate* from this Court that they must now exercise jurisdiction over deaths occurring on the high seas. It is critical that *Tallentire* be clarified as permitting concurrent jurisdiction *only* for those states which had exercised such jurisdiction prior to the enactment of DOHSA.

With respect to the second issue, it is equally important to clarify the status of the waters surrounding San Clemente Island. Those waters are subject to the jurisdiction and control of the federal government, just as is the island itself. The island and those surrounding waters are used exclusively for military and navigational purposes. To permit fifty states with no nexus whatsoever to the island to impose their jurisdiction and laws would seri-

ously impede the military and navigational uses of the island and its surrounding waters.

San Clemente Island is no different from an aircraft carrier of the United States Navy lying 50 miles offshore from California. It is subject to federal law and federal jurisdiction, and no State should be permitted to interfere with that law or that jurisdiction.

SAN CLEMENTE ISLAND IS NOT AND NEVER HAS BEEN PART OF THE STATE OF CALIFORNIA; OWNERSHIP OF AND JURISDICTION OVER THE ISLAND AND ITS SURROUNDING WATERS HAVE ALWAYS RESTED SOLELY WITH THE FEDERAL GOVERNMENT

The history of San Clemente Island as an exclusive possession of the United States Government is well documented. All public lands within and appurtenant to the territorial limits of what is now the State of California were acquired by the United States from Mexico in 1848 under the terms of the Treaty of Guadalupe Hidalgo (February 2, 1848; 9 Stat. 922 Appendix p. A-6). Pursuant to an Act of Congress, those public lands, which included San Clemente Island, remained the property of the United States when California was admitted to the Union:

> "Sec. 3. And be it further enacted, That the said State of California ia admitted into the Union upon the express condition that the people of the State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or

questioned." (Act of September 9, 1950, Section 3, 9 Stat. 452; Appendix p. A-8).

The California Supreme Court has recognized that title to all public lands was retained by the federal government upon the admission of California to the Union (*Standard Oil Co. v. Johnson* (1938) 10 Cal.2d 758).

In 1897, the California Legislature adopted "An Act ceding to the United States of America jurisdiction over all lands within this State which have been or may hereafter be acquired by the United States for military purposes," which provides in pertinent part:

> "Sec. 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat or such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands."

(Act of March 2, 1897 (California Statutes for 1897, p. 51); Appendix p. A-9).

By Executive Order 6897 of November 7, 1934, control and jurisdiction over San Clemente Island was transferred from the Department of Commerce to the Department of the Navy (Appendix p. A-10). To reflect the

federal government's exclusive title to and jurisdiction over San Clemente Island, the Navy, on April 20, 1935, filed with the County Recorder for the County of Los Angeles, a document designated as United States Coast and Geodetic Survey Map No. 5101, along with a copy of Executive Order 6897. (Appendix p. A-11).

The above-referenced treaty, statutes, Executive Order and filing conclusively establish that the State of California has *never* held title to San Clemente Island. The island was ceded by Mexico directly to the United States Government and was specifically excepted from the grant of Statehood. Moreover, any putative title that the State of California may have held was relinquished by the Act of March 2, 1897, which reconfirmed title in military reservations in the federal government. This island lies in the Pacific Ocean far outside of California territorial waters.

THE WATERS WITHIN 3 NAUTICAL MILES OF THE SHORELINE OF SAN CLEMENTE ISLAND ARE HIGH SEAS FOR PURPOSES OF DOHSA

Given that San Clemente Island belongs to the federal government, it follows that the waters surrounding the Island for a distance of three nautical miles (one marine league) also are subject to the jurisdiction of the United States. As Chief Justice Marshall noted in *United States v. Bevans* (1818) 3 Wheat. 336, 16 U.S. 336, 4 L.Ed. 404:

> (416)
>
> "What, then is the extent of jurisdiction which a state possesses?
>
> We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power."

The only sovereign entity holding title to San Clemente Island is the federal government, and its jurisdiction over the island is therefore exclusive.

Likewise, the United States Government's jurisdiction extends to the water surrounding San Clemente Island for a distance of three nautical miles, or one marine league.

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast. . . ." *Manchester v. Commonwealth of Massachusetts* (1890), 139 U.S. 240, 35 L.Ed. 159, 164.

The court in *Hooker v. Raytheon Co.* (S.D.Cal. 1962), 212 F.Supp. 687 stated:

> (693)
>
> "The international rules and acts of nations would appear to limit the territorial waters of a [country] to a belt one marine league off the shores of the mainland and a similar belt around the offshore islands which are a part of the state.
>
> * * *
>
> With respect to islands, the text writer, Evensan, in Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos, U.N. Doc. A/Conf. 13/18, in 1 Off. Rec. 289, 297, observes that the United States' attitude on the marginal seas surrounding islands is considered very strict. The United States considers that an island has the same marginal belt as any other coastline, not subject to extension to include gaps or enclaves between islands and the mainland."

At one time, California claimed jurisdiction over all the waters between the mainland of the state and the offshore islands. However, in *People v. Weeren* (1980), 26 Cal.3d 654, *cert. den.*, 449 U.S. 839, 66 L.Ed. 2d 45, it was held that the waters of the Santa Barbara Channel did not belong to California, but were international waters. In that case, defendant was charged with a violation of the Fish and Game Code prohibiting the use of a spotter aircraft for commercial swordfishing. He was apprehended at a point 10 miles south-southeast of Anacapa Island, more than 3 nautical miles from the shore of the mainland, or of any California coastal island (*Id.* at 659). Defendant claimed that he was apprehended in international waters and, therefore, could not be charged with a State law violation. The State claimed that the State's territorial waters were defined by Government Code §§ 170 and 171, and included all waters encompassed within a line drawn from the Mexican border to the Channel Islands and thence northward. In rejecting this argument the court held it was bound by *United States v. California* (1965) 363 U.S. 1, 4 L.Ed.2d 1025, which established the State's 3 mile boundary as measured from the coastline, noting:

(665)

"Our conclusion that *California II* necessarily defined the state's inland waters for all national purposes conforms with prior decisions, which have consistently held or assumed that, for purposes of federal law, California's territorial claims in the coastal channels and straits are limited to three-mile belts off the mainland shore and surrounding the coastal islands. [Numerous citations omitted]."

It is also clear that the waters within 3 miles of San Clemente Island are properly considered as high seas for purposes of DOHSA. Title 46 U.S.C. § 761 provides that an action under DOHSA may be maintained:

> "[W]henever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States . . .".

As previously discussed, San Clemente Island is owned by the United States and has been reserved for military and navigational purposes under the exclusive jurisdiction and control of the Department of the Navy. DOHSA applies to the waters surrounding San Clemente Island because the Island does not fall under any of the geographic measuring points enumerated in 46 U.S.C. § 761. It is not a part of any state for the reasons mentioned previously. By definition, San Clemente Island is not a territory of the United States. The term "territories" includes only those portions of the territorial possessions of the United States which are organized and exercise governmental functions under an Act of Congress. (*United States Lines Co. v. Eastburn Marine Chemical Co.* (S.D.N.Y., 1963) 221 F.Supp. 881; *see: Ex Parte Lane* (1890) 135 U.S. 443, 34 L.Ed. 219).

Similarly, San Clemente Island cannot be considered a dependency of the United States because that term refers only to those territories acquired by cession as a result of the Spanish American War (*Hooven E. Allison Co. v. Evatt* (1944) 324 U.S. 652, 89 L.Ed. 1252; *Filipino American Veterans and Dependents Assoc. v. United States* (N.D.Cal., 1974) 391 F.Supp. 1314).

The nearest point of land fitting the requirements of DOHSA is Santa Catalina Island. San Clemente Island is approximately 21 miles from the nearest point of Catalina, and is 56 miles from the mainland of California. Thus, all the waters surrounding San Clemente are high seas for purposes of DOHSA.

The court in *Cormier v. Williams/Sedco/Horn Constructors* (E.D.La., 1978) 460 F.Supp. 1010, reached an identical conclusion upon analogous facts. In that case, a seaman drowned in the Maranone River near Iquitos, Peru. The issue before the court was whether a river which was part of the navigable inland waters of a foreign country was still "high seas" for the purposes of DOHSA. In answering that question in the affirmative, the court stated:

(1011)

> "At the time that the Act was passed, the Supreme Court had held that there was no general maritime wrongful death recovery. Deaths occurring in state territorial waters — within 3 miles from shore — were covered by State wrongful death statutes. Congress passed the Death on the High Seas Act in 1920 to provide a corresponding remedy for deaths occurring *outside the reach of state law.*" (Emphasis by the court)

The court concluded:

(1012)

> "Accordingly, the location of the accident in this case is one which Congress contemplated that the Act would cover, since it is over 3 miles from the shore of any state — *outside the reach of state law.*" (Emphasis added)

A similar conclusion is compelled in the instant case. The Complaint alleges that the crash occurred two and one-half miles from the shore of San Clemente Island. That location is on the high seas, and DOHSA creates the sole cause of action for the deaths occurring at that place.

THIS COURT'S HOLDING IN *OFFSHORE LOGISTICS V. TALLENTIRE* RECOGNIZES CONCURRENT STATE COURT JURISDICTION UNDER DOHSA ONLY WITH RESPECT TO THOSE STATES WHOSE WRONGFUL DEATH STATUTES HAD BEEN APPLIED TO DEATHS OCCURRING ON THE HIGH SEAS PRIOR TO DOHSA

The latest opinion from this Court regarding the extent of subject matter jurisdiction under DOHSA is *Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207, 91 L.Ed.2d 174. In that case, this Court recognized that § 7 of DOHSA constituted a *jurisdictional savings clause.* Prior to *Tallentire,* lower courts had held that federal court jurisdiction over deaths occurring on the high seas was *exclusive:*

> *Trihey v. Transocean Airlines,* 255 F.2d 824 (9th Cir. 1958), *cert. den.* 358 U.S. 838 (1958);
>
> *Higa v. Transocean Airlines,* 230 F.2d 780 (9th Cir., 1956);
>
> *Kropp v. Douglas Aircraft Co.,* 329 F.Supp. 447 (E.D. N.Y., 1971);
>
> *Kunkel v. United States,* 140 F.Supp. 591 (S.D.Cal., 1956).

However, in *Tallentire* this Court analyzed the legislative history regarding § 7 of DOHSA, and concluded that, in enacting that section as amended, Congress intended to preserve concurrent State Court jurisdiction *in those cases where State Court wrongful death statutes had permitted claims for deaths occurring on the high seas prior to the 1920 enactment of DOHSA.* The Court summarized Representative Mann's comments during the legislative hearings as follows:

> (477 U.S. at ____; 91 L.Ed.2d at 192)
>
> "[I]f state courts had ever *previously* exercised jurisdiction over death claims arising on the high seas, they should be permitted to *continue* to do so." (Emphasis added)

Prior to the enactment of DOHSA in 1920, a number of jurisdictions entertained claims under their wrongful death statutes for deaths occurring on the high seas:

> *International Navigation Co. v. Lindstrom* (2d Cir., 1903) 123 F. 475 (New Jersey wrongful death statute);
>
> *Southern Pacific Co. v. de Valle da Costa* (1st Cir., 1911) 190 F. 689 (Kentucky wrongful death statute);
>
> *Souder v. Fore River Shipbuilding Co.* (1916) 223 Mass. 509, 112 N.E. 82 (Massachusetts wrongful death statute);
>
> *The Hamilton* (1907) 207 U.S. 398, 52 L.Ed. 264 (Delaware wrongful death statute);
>
> *La Bourgogne* (1908) 210 U.S. 95, 52 L.Ed. 973 (Louisiana wrongful death statute).

Clearly, *Tallentire* recognizes that each of these jurisdictions may exercise concurrent jurisdiction over

DOHSA claims, with the appropriate state wrongful death statute conferring subject matter jurisdicton, and DOHSA providing the applicable legal standard. However, it is equally clear that the congressional debate regarding § 7 focused only on an intention to permit those States that had *previously* permitted actions for deaths on the high seas to continue to do so. Nowhere in the debates, or in the rationale of this Court in *Tallentire* is there any indication that new rights were being extended to the States. All Congress intended to do was preserve jurisdiction which had previously been exercised by certain States. There was no intention to require States that had refused to exercise jurisdiction over deaths on the high seas to now begin hearing such actions.

CALIFORNIA'S WRONGFUL DEATH STATUTE HAS NEVER CONFERRED JURISDICTION OVER ACTIONS FOR DEATHS OCCURRING ON THE HIGH SEAS

In *Taylor v. The Steamer Columbia* (1885) 5 Cal. 268, the California Supreme Court recognized the ability of a State to confer upon its own courts both admiralty and maritime jurisdiction, not subject to limitation by the federal government (*Id.* at 274). The California Supreme Court thus recognized, prior to the enactment of DOHSA, that the California legislature had the power, *if it so chose,* to give extraterritorial effect to its wrongful death statute, and to create a state cause of action for deaths occurring on the high seas. The California Supreme Court continued to recognize this principle as late as 1917 when, in *North Pacific Steamship Co. v. Industrial Accident Commission* (1917) 174 Cal.346, it held that the Constitutional grant of admiralty jurisdiction referred only to general jurisdiction over cases of admiralty cognizance, and did not preclude the creation of new rights and

remedies in maritime matters by the States, enforceable in State courts.

The California wrongful death statute, CCP § 377, has been held to apply to causes of action for deaths occurring *within* State territorial waters (*Curry v. Fred Olsen Line* (9th Cir., 1966) 367 F.2d 921). However, that same statute has repeatedly been held to have no extraterritorial effect, and has specifically been held to have no application with respect to deaths occurring on the high seas.

The earliest reported case involving the extraterritorial effect of CCP § 377 was *Armstrong v. Beadle* (D.Cal., 1879) 1 Fed.Cas. 1138, where the Court stated that "There is nothing in the statute [CCP § 377] to indicate that it was intended to operate beyond the limits of the State" (*Id.*).

The issue next arose in *Ryan v. North Alaska Salmon Co.* (1908) 153 Cal. 438. *Ryan* involved an action brought in California arising from the death of any individual in Alaska. In affirming the lower Court's action sustaining a demurrer to the complaint, the California Supreme Court stated:

(440)

> "[T]he right conferred by [CCP § 377] can be exercised only where the cause of action has arisen within the jurisdiction of this state, and not in cases such as this, where the measure of the right and the form of procedure are those dictated by a foreign statute."

The issue was next addressed by the Supreme Court forty-five years later in *Grant v. McAuliffe* (1953) 41 Cal.2d 859, where, in dictum, the Court cited with approval the following language from Judge Learned

Hand's opinion in *Guiness v. Miller* (S.D.N.Y., 1923) 291 F. 769:

(770)

"[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign."

The issue regarding application of CCP § 377 to causes of action for deaths occurring in the Pacific Ocean more than 3 miles from the shore of California was directly addressed in *Gordon v. Reynolds* (1960) 187 Cal.App.2d 472. *Gordon* involved an action for wrongful death occurring as a result of an airplane crash on the high seas off the coast of California. In affirming the lower Court's dismissal of the action on the grounds that it lacked subject matter jurisdiction over the controversy, the Court first cited with approval Justice Holmes' observation that "all legislation is territorial" (*Gordon, supra* at 476, citing *American Banana Co. v. United Fruit Co.* (1909) 213 U.S. 347, 357, 53 L.Ed. 826). The Court then concluded:

(477)

"We find nothing in Code of Civil Procedure, section 377, indicating that it was intended to have any extra-territorial effect."

CONCLUSION

In summary, although California courts have historically recognized the power of the legislature to extend the reach of CCP § 377 beyond the territorial limits of the State, those same Courts have uniformly recognized that the legislature never intended the statute to be applied so broadly. Prior to the enactment of DOHSA, California courts declined to exert extra-territorial wrongful death jurisdiction, even though other States did so. *Tallentire* recognized that § 7 of DOHSA preserved the subject matter jurisdiction previously exercised by those States. However, a Congressional intent to *preserve* jurisdiction cannot be read as an implied intent to *create* jurisdiction where none had existed.

This Petition should be granted in order to clarify the scope of *Tallentire* and limit the scope of § 7 of DOHSA to the clearly stated Congressional intent.

Respectfully submitted,

JAMES M. DERR, ESQ.
BELCHER, HENZIE & BIEGENZAHN
Counsel for Petitioner

APPENDIX A

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. 21

Court convened at _____ M. July 2, 1987, present Hon. Gary L. Taylor, Judge; Kathy Sweetser, Deputy Clerk, and the following proceedings were had:

46-00-74

KOSS VS. SIKORSKY AIRCRAFT DIVISION

The court having taken the matter under submission on 7-1-87 rules as follows: Motions to dismiss are DENIED. Responding party to give notice. ENTERED 7-2-87

Robinson, Robinson & Phillips, P.O. Box 12900, Santa Ana, Ca 92712

Johnsen, Manfredi & Thorpe, 10900 Wilshire Blvd. 11th Flr., Los Angeles, Ca 90024

Belcher, Henzie & Biegenzahn, 333 S. Hope St. #3650, Los Angeles, Ca 90071-1479

Clerk's certificate of Mailing (CCP 1013a) — I certify I am not a party to this cause, over age 18, and a copy of this document was mailed first class postage prepaid in a sealed envelope addressed as shown above. Mailing and execution of this certificate occurred 7-3-87, Santa Ana, California

Gary L. Granville, Clerk, By: K. Sweetser, Deputy

Received: July 07, 1987

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

SIKORSKY AIRCRAFT,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE,
Respondent;

THERESA KLOSS, et al.,
Real Parties in Interest.

G005794
(Super. Ct. No. 46 00 74)

ORDER

Filed: Sept. 18, 1987 Keenan G. Casady, Clerk

THE COURT:*

The petition for a writ of prohibition/mandate is DENIED.

WALLIN, Acting P.J.

---

*Before Wallin, Acting P.J., Sonenshine, J. and Crosby J.

A-3

No. S002698

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

SIKORSKY AIRCRAFT, etc., et al.,
Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF ORANGE,
Respondent:

KLOSS et al.,
Real Parties in Interest.

Filed: Oct. 15, 1987 Laurence P. Gill, Clerk

The above entitled matter is transferred to the Court of Appeal, Fourth Appellate District. (See *Hagan v. Superior Court* (1962) 57 Cal.2d 767.)

PANELLI, J.
Acting Chief Justice

IN THE COURT OF APPEALS
OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SIKORSKY AIRCRAFT DIVISION, et al.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE,
Respondent;

THERESA KLOSS, et al.,
Real Parties in Interest.

No. G006044
(Super. Ct. No. 46 00 74)
Filed Nov. 5, 1987

Keeman G. Cassady, Clerk

ORDER

THE COURT:*

We denied petitioner's initial writ application on September 18, 1987. This renewed petition for a writ of prohibition/mandate presents nothing new. It is consequently DENIED.

WALLIN, ACTING P.J.
Wallin, Acting Presiding Justice

---

*Before Wallin, Acting P.J., Sonenshine, J. and Crosby, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3,
No. G006044, S003127

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

SIKORSKY AIRCRAFT DIVISION etc., et al.,
Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF ORANGE,
Respondent;

KLOSS et al.,
Real Parties in Interest.

Filed December 16, 1987
Laurence P. Gill, Clerk

Petitioners' petition for review DENIED.

LUCAS
Chief Justice

TREATY OF GUADALUPE HIDALGO

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called P...o) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled *"Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Disturnell."* Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it

unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana,* of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each, in conformity with its own constitution.

ACT OF CONGRESS, SEPTEMBER 9, 1850

"Sec. 3. And be it further enacted, That the said State of California is admitted into the Union upon the express condition that the people of the State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law or do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned." Act of September 9, 1950, Section 3, 9 Stat. 452.

ACT OF MARCH 2, 1897
(CALIFORNIA STATUTES OF 1897, P.51)

"Sec. 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat or such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this State reserves the right to serve and executive on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands."

EXECUTIVE ORDER NO. 6897

TRANSFERRING TO THE CONTROL AND JURISDICTION OF THE SECRETARY OF THE NAVY CERTAIN LANDS OFF THE SOUTHERN COAST OF CALIFORNIA

CALIFORNIA

By virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and as President of the United States, it is ordered that San Clemente Island and the rocky island at west entrance to North West Harbor, San Clemente Island, California, between longitude 118°20′45″ W. and 118°26′30″ W. and latitude 32°48′15″ N. and 33°02′15″ N., containing 31,500 acres, more or less, which were reserved for lighthouse purposes by Executive orders dated September 11, 1854, and January 26, 1867, be, and they are hereby, transferred from the control and jurisdiction of the Secretary of Commerce to the control and jurisdiction of the Secretary of the Navy for naval purposes; there being reserved, however, for the use of the Department of Commerce sites to be selected by that Department on which to erect and maintain such aids to navigation and incidental facilities as the Secretary of Commerce may consider desirable.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
November 7, 1934.

[No. 6897]

COMMANDANT'S OFFICE
ELEVENTH NAVAL DISTRICT
SAN DIEGO, CALIFORNIA

N1-13/N1-9(a-1)
(PW) G-B

Apr 9, 1935

County Recorder,
Los Angeles County
Los Angeles, Calif.

Sir:

The Judge Advocate General of the Navy Department has directed this office to file the following papers among the land records of Los Angeles County in conformity with the provisions of the General Cession Act of the State of California, approved March 2, 1897, Cal. Stat. 1897, page 51, in order that exclusive jurisdiction over such Islands may vest in the United States:

1. U.S.C. G.S. Map No. 5101 (Feb. 4, 1935), showing San Clemente Island.

2. Executive Order of the President, No. 6897, of November 7, 1934, reserving San Clemente Island.

These papers are accordingly forwarded herewith with the request that they be filed among the County Records and that the necessary certificate be forwarded to this office for transmittal to the Navy Department.

It appears that prior to the transfer of control and jurisdiction of these Islands from the Secretary of Commerce to the Secretary of the Navy, no steps had been taken by the Department of Commerce to obtain a Ces-

sion of Jurisdiction from the State of California under the aforementioned Act.

Very truly yours,

W. T. TARRANT,
Rear Admiral, U.S. Navy,
Commandant.

Enc. (2).

CALIFORNIA CODE OF CIVIL PROCEDURE, § 377 WRONGFUL DEATH; RIGHT OF ACTION; DAMAGES; CONSOLIDATION OF ACTIONS

(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

(b) For the purposes of subdivision (a), "heirs" means only the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions

of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code,

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid, and

(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support.

Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provision of law. (*Enacted 1872. Amended by Code Am. 1873-74, c. 383, § 40; Stats.1935, c. 108, § 1; Stats.1949, c. 1380, § 4; Stats.1961, c. 657, § 5; Stats.1968, c. 766; § 1; Stats.1975, c. 334; § 1; Stats.1975, c. 1241, § 5.5; Stats.1977, c. 792, § 1; Stats.1983, c. 842, § 12.)*

(2)

No. 87-1633

In The
Supreme Court of the United States
October Term, 1987

SIKORSKY AIRCRAFT DIVISION,
UNITED TECHNOLOGIES CORPORATION,

Petitioner,

vs.

THERESA KLOSS, LORI K. UTSINGER,
individually and as Guardian ad Litem for
JOHN FRANCIS UTSINGER, a Minor, and
AIMEE MAY UTSINGER

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEVIN CALCAGNIE, ESQ.
ROBINSON, ROBINSON & PHILLIPS
26300 La Alameda, Suite 300
Post Office Box 9010
Mission Viejo, CA 92690-7010
Telephone: 714/955-1014

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether a California state court may exercise concurrent jurisdiction over a wrongful death claim arising on the high seas, when no reported decision of a California Appellate Court had ever addressed the issue prior to the enactment of the Death on the High Seas Act.

2. Whether Congress or this Court intended that concurrent jurisdiction over high seas death claims would be limited to those few states in which appellate courts had already considered and permitted jurisdiction prior to DOHSA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Rules

TABLE OF AUTHORITIES—Continued

Pages

STATUTES

No. 87-1633

In The
Supreme Court of the United States
October Term, 1987

SIKORSKY AIRCRAFT DIVISION,
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

THERESA KLOSS, LORI K. UTSINGER, individually and as Guardian ad Litem for JOHN FRANCIS

UTSINGER, a Minor, and AIMEE MAY UTSINGER, the Respondents herein, pray that the Petition of SIKORSKY AIRCRAFT DIVISION, UNITED TECHNOLOGIES CORPORATION, for Writ of Certiorari filed in this Court on March 14, 1988 be denied.

STATEMENT OF THE CASE

This action for wrongful death concerns the crash of a United States Marine Corps helicopter which occurred on June 1, 1984 near San Clemente Island off the coast of California. The plaintiffs are the heirs of two United States Marines, both of whom were California residents stationed in Tustin, California, who were killed when their Sikorsky CH-53E Super Stallion helicopter plunged into the Pacific Ocean while carrying a truck from the deck of the U.S.S. Denver to the island.

Subsequent investigation revealed that the crash was caused by design defects in helicopters of this type which have been plagued by a history of numerous mishaps over the past several years, resulting in several fatal crashes. The plaintiffs have brought a products liability action against Petitioner, the manufacturer of the helicopter, and other defendants.

The action was commenced on May 31, 1985 in the Superior Court of the State of California for the County of Orange. On July 1, 1987, following the running of the three-year statute of limitations under DOHSA, Petitioner brought a motion to dismiss the action, contending that California courts have no jurisdiction over wrongful death

claims arising on the high seas. Following the denial of the motion on July 7, 1987, petitioner filed a Petition for Writ of Prohibition with the Court of Appeal of the State of California, Fourth Appellate District on September 11, 1987. The petition was untimely, as it was filed well beyond the 60-day time limit specified under California law. (*Kruger v. Superior Court* (1979) 89 Cal.App. 3d 934, 152 Cal.Rptr. 870; *Reynolds v. Superior Court* 64 Cal. 372, 28 P. 121)

The petition was denied on September 18, 1987. Subsequently, on October 9, 1987, Petitioner filed a Petition for Review in the California Supreme Court, which was also untimely, having been filed beyond the 10 day time limit prescribed by rule 28(b) of the California Rules of Court. (Appendix A-1) The petition was transferred back to the Court of Appeal where it was denied on November 5, 1987. Another Petition for Review to the California Supreme Court on the same issue was denied on December 16, 1987.

———o———

REASONS FOR DENYING THE WRIT

The California courts have correctly chosen to exercise jurisdiction over this action pursuant to this Court's recognition of concurrent jurisdiction in the case of *Offshore Logistics v. Tallentire* (1987) 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d. Neither Congress nor this Court ever intended that concurrent jurisdiction over death claims arising on the high seas would be restricted to those few states in which courts had already addressed the issue of

jurisdiction, and denied to the numerous states wherein no reported decisions discussed the issue prior to the enactment of DOHSA.

Rather, the intent of section 7 of DOHSA was to preserve concurrent jurisdiction to all state courts which are empowered under their laws to exercise jurisdiction, as the California courts have done here. Exercise of jurisdiction by California courts will not in any way conflict with federal law, nor impede use of federal land and waters. Recognition of concurrent jurisdiction will only promote the goals enunciated by this Court in the *Tallentire* decision, which include effective and just administration of remedies, and preventing disunity in the provision of forums to survivors of those killed on the high seas.

———o———

ARGUMENT

1. A STATE COURT HAS CONCURRENT JURISDICTION OVER CLAIMS INVOLVING DEATHS ON THE HIGH SEAS, IRRESPECTIVE OF WHETHER THAT STATE HAD EXERCISED SUCH JURISDICTION PRIOR TO THE ENACTMENT OF DOHSA

Petitioner contends that this Court's holding in *Offshore Logistics v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d (1987), recognizes concurrent jurisdiction of state courts over claims involving deaths on the high seas, but only in those states which had exercised such jurisdiction prior to the enactment of the Death on the High Seas Act. (46 U.S.C. 761 et seq.) Seizing upon a single line from the *Tallentire* opinion, Petitioner argues that the

decision must be clarified as limiting concurrent jurisdiction to those few states.

However, a more careful reading of the *Tallentire* decision (106 S.Ct. at 2496-7) and the cited portions of the congressional record (51 Cong.Rec. 1928 (1914), 59 Cong. Rec. 4482-5 (1920)), makes it unequivocally clear that no such limitation was ever intended by Representative Mann nor by the Court. *Nowhere* is there an expression of any attempt to limit jurisdiction to the few states courts which *had* exercised jurisdiction. On the contrary, the concern was to preserve the jurisdiction of any state court which *could* exercise jurisdiction:

> (477 U.S. at —; 106 S.Ct. at 2497)
>
> "'I was under the impression that the bill was not intended to take away any jurisdiction which *can* now be exercised by any state court'); *Ibid.* ('If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction *now conferred* by state statutes, it ought to be critically examined'). By suggesting deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas. See, e.g., *Ibid.* (Under Rep. Mann's amendment, where a state *gives* a cause of action and a death occurred on the high seas 'there would be concurrent jurisdiction'); *Id.*, at 4485 (If section 7 were amended as he suggested 'the Act will not take away any jurisdiction conferred now by the states')." (Emphasis added.)

Certainly section 7 was not intended, as Petitioner contends, to act like some sort of grandfather clause,

granting jurisdiction to those states which had fortuitously already considered the question, while denying jurisdiction to the much greater number of states in which the issue had never been raised in a published appellate decision. More importantly, such an interpretation would defeat the sound and compelling rationale for permitting concurrent jurisdiction, which was advanced by this court in the *Tallentire* decision:

> (477 U.S. at —; 106 S.Ct. at 2500)
>
> "Viewed in this light, section 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the effective and just administration of those remedies. The recognition of concurrent state jurisdiction to hear DOHSA actions makes available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims. (Citation) Because the resolution of DOHSA claims does not normally require the expertise that admiralty courts bring to bear, DOHSA actions are clearly within the competence of state courts to adjudicate. (Citation) Also, the availability of concurrent jurisdiction prevents disunity in the provision of forums to survivors of those killed on the high seas; it ensures that if a seaman and a passenger are killed at sea in the same accident, the beneficiaries of both are able to choose the forum in which they prefer to proceed. (Citations)

Petitioner's artificial limitation would prevent uniform application of these principles, and would indiscriminately deny the courts of numerous states jurisdiction over claims which they would otherwise assert. It would also require the already overburdened federal district courts to hear actions which state courts are equally competent to adjudicate.

Petitioner's contention that the recognition by this court of concurrent jurisdiction will be seen by the state

courts as a mandate that they must exercise jurisdiction, is completely unfounded. Nothing in the *Tallentire* decision requires a state court to do anything its law will not permit. It seems much more realistic that the state courts will preceive the exercise of jurisdiction not as a requirement, but as a prerogative which they may have previously denied themselves due to a pre-*Tallentire* misperception that the jurisdiction of the federal courts was exclusive.

2. CALIFORNIA LAW DOES NOT PROHIBIT THE EXERCISE OF JURISDICTION OVER CLAIMS OF ITS CITIZENS ARISING ON THE HIGH SEAS, AND CALIFORNIA COURTS HAVE CONSISTENTLY ASSUMED JURISDICTION OVER CLAIMS INVOLVING EXTRATERRITORIAL INJURIES

Relying on the absence of any pre-DOHSA California decision which addresses this specific issue, Petitioner argues that California's wrongful death statute "has never conferred jurisdiction" over actions for deaths occurring on the high seas, and that the California courts have historically declined to exercise extraterritorial wrongful death jurisdiction. Implicit in petitioner's argument is that given the choice, modern California courts would choose not to exercise jurisdiction here, as they have already done.

Aside from this basic flaw, and the fact that California Code of Civil Procedure section 377 does not in any way purport to geographically limit its application, an analysis of California law, including the cases cited by Petitioner, demonstrates that California courts can and do exercise jurisdiction over extraterritorial claims arising from injury to and death of California residents.

In the case of *Taylor v. Steamer Columbia* (1885) 5 Cal. 268, the California Supreme Court recognized that a California court could entertain jurisdiction, wherever the cause of action may have arisen, "whether on land or water, on the high seas, in harbor, within the ebb and flow of the tide, or on dry land." (5 Cal. at 271) The court in *North Pacific Steamship Company v. Industrial Accident Commission* (1917) 174 Cal. 346, in fact chose to exercise jurisdiction over an action involving an injury on the high seas.

In *Ryan v. North Alaska Salmon Company* (1908) 153 Cal. 438, the court held only that the plaintiffs complaint was improperly plead, but it did not hold that a California court could not hear the claim. On the contrary, the court concluded that where an action such as the claim before it was transitory in nature, it could be asserted and enforced in the State of California.

In *Grant v. McAuliffe* (1953) 41 Cal.2d 859, an action for personal injuries against the estate of the decedent, the court held that even though the motor vehicle accident which was the subject of the action occurred in Arizona, the three California residents could prosecute their action in California under California law. (41 Cal.2d at 867)

Finally, the only case addressing DOHSA, the 1960 California appellate court decision of *Gordon v. Reynolds* (1960) 187 Cal.App.2d 472, relied heavily on a misinterpretation of 46 U.S.C. 761 et seq. The court erroneously concluded, as did pre-*Tallentire* decisions in other states, that federal jurisdiction over deaths occurring on the high seas was exclusive. The bottom line is that no pre-DOHSA case from a California court ever held that a California court could *not* exercise jurisdiction over a death claim arising outside the state's borders.

Petitioner concedes that Louisiana state courts would have concurrent jurisdiction under *Tallentire*, but contends California courts would not. Petitioner has erroneously concluded that Louisiana had prior to 1920 applied its wrongful death statute to deaths occurring on the high seas. The *La Bourgogne* (1908) 210 U.S. 95, 52 L.Ed. 973, cited by Petitioner, had nothing to do with the law of Louisiana, but instead involved the issue of whether the law of France provided an action for wrongful death of a French citizen. (210 U.S. at 138)

Moreover, there is nothing special about the Louisiana wrongful death statute, referred to by the Fifth Circuit Court of Appeal in *Offshore Logistics, Inc. v. Tallentire* ((5th Cir. 1985) 754 F.2d 1274), which distinguishes it from the California statute. The statute itself, Louisiana Civil Code section 2315.2 (Appendix page A-2), makes no reference to its application outside the territory of Louisiana. The Fifth Circuit Court of Appeal pointed out:

> (754 F.2d at 1286)
>
> "Article 2315 provides no clue as to whether it is intended to apply to death occurring on the high seas. Louisiana decisional law construing Article 2315 also furnishes no concrete guidance concerning whether the provision should have extraterritorial application."

However, the Fifth Circuit court concluded that plaintiffs had a claim under Louisiana law for death on the high seas based upon the fact that Louisiana would apply its tort law to occurrences in other states:

(754 F.2d at 1286)

"It is significant, however, that Louisiana will apply its tort law to an event or transaction occurring in another state, if Louisiana has a sufficient interest in the transaction. (Citations) We also note that Louisiana applies its workman's compensation law to employees meeting certain statutorily defined conditions, even if the injury occurs in another state, a foreign country, or on the outer continental shelf. (Citations) Workman's compensation statutes and wrongful death statutes, broadly speaking, have the same purpose: To ensure that injured individuals or their survivors are compensated. There can be little doubt that Louisiana has a strong interest in seeing that the survivors of its citizens killed by the fault of another are adequately compensated. It is most reasonable, unless the Louisiana courts or legislature indicate a contrary intent, to assume that the state intended the protection of this law to extend to its constitutional limits."

Not surprisingly, California decisional law regarding the exercise of jurisdiction over accidents arising outside of the state's boundaries is identical to that of Louisiana. In *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 127 Cal.Rptr. 532, a California resident plaintiff brought a wrongful death action against a Nebraska resident, arising out of an accident which occurred in Nevada. The California Supreme Court held that the exercise of jurisdiction by a California court was proper, despite the fact that the accident occurred in another state.

Similarly, California applies its Workers' Compensation law to cases involving injuries to California residents, even if the injuries arise outside the State's territorial limits. California Labor Code section 5305 (Appendix A-3) provides, in pertinent part:

> "The appeals board has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of the state at the time of the injury."

Moreover, the residency requirement of this Labor Code section has been held unconstitutional. Thus, it is unnecessary that the employee has been a resident of California at the time of his out-of-state injury, so long as he was hired within the State of California. (*Alaska Packers Association v. IAC,* 1 Cal.2d 250, 20 IAC 219, aff'd, 294 U.S. 532)

As can be seen, California courts have in fact historically chosen to exercise jurisdiction over claims of California residents arising outside the state, and have correctly chosen to do so in the case at bar.

3. EXERCISE OF JURISDICTION BY CALIFORNIA COURTS WILL NOT IMPEDE MILITARY AND NAVIGATIONAL USES OF SAN CLEMENTE ISLAND AND ITS SURROUNDING WATERS

Petitioner argues that San Clemente Island and its surrounding waters are under the exclusive jurisdiction of the federal government, and that permitting California courts to impose jurisdiction and California law would seriously impede the military and navigational uses of the island and its surrounding waters. However, there is simply no factual basis for such an assumption, nor any logical reason to believe that exercise of jurisdiction by California state courts over death claims arising on the high seas would in any way interfere with the federal government's uses of San Clemente Island.

Moreover, California does in fact have an ownership interest in tide and submerged lands off the coast of San Clemente Island, where the subject helicopter came to rest. According to California Public Resources Code section 6871.2(a) (Appendix A-4), state-owned tide and submerged lands are located within:

> "The tide and submerged lands surrounding the islands of San Clemente and Santa Catalina waterward of the ordinary high-water mark of the Pacific Ocean on such islands to a distance of three nautical miles."

The State of California's interest notwithstanding, this Court's decision in *Tallentire* unequivocally held that state substantive law is not guaranteed, even though a state court chooses to exercise jurisdiction over a high seas death claim. (106 S.Ct. at 2500)

Finally, California courts have long recognized that even when exercising jurisdiction over a maritime cause of action, they must preserve all substantial admiralty rights of the litigants and may not apply conflicting state substantive law. *(Intagliata v. Ship Owners and Merchants Tow Boat Company, Ltd.* (1945) 26 Cal.2d 365,370, 169 P.2d 1; *Fahey v. Gledhill* (1983) 33 Cal.3d 884,887, 653 P.2d 197)

—o—

CONCLUSION

Neither the decision of this court in *Offshore Logistics v. Tallentire* nor the Congressional Record expressed any intent to restrict current jurisdiction over wrongful death claims arising on the high seas, to only those few

states in which appellate courts had had occasion to approve the exercise of such jurisdiction prior to the enactment of the Death on the High Seas Act. Such a limitation would defeat the purposes of section 7 of the Act as recognized by this court in *Tallentire,* promote disunity in the application of section 7, and unreasonably deny jurisdiction to courts of many states which would otherwise be competent and willing to adjudicate such claims.

The California courts have correctly chosen to assume jurisdiction here, based upon the imprimatur of this Court as well as the long-standing policy of exercising jurisdiction over actions of California residents for deaths and injuries occurring outside the Sate of California.

Accordingly, and for all the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KEVIN CALCAGNIE, ESQ.
ROBINSON, ROBINSON & PHILLIPS
26300 La Alameda, Suite 300
Post Office Box 9010
Mission Viejo, CA 92690-7010
Telephone: 714/955-1014

Counsel for Respondents

APPENDIX A

California Rules of Court
Rule 28. Review by Supreme Court

(b) [Time for filing] A party seeking review must serve and file a petition within ten days after the decision of the Court of Appeal becomes final as to that court, but a petition may not be filed as to the denial of a transfer to a Court of Appeal in a case where the original jurisdiction is within the original jurisdiction of a municipal or justice court.

Louisiana Civil Code

C.C. Art 2315.3. Wrongful death action.

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;

(2) The surviving father and mother of the deceased, or either of them, if he left no spouse or surviving child; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or, parent surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this article.

D. As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father and mother, by adoption, respectively.

Added by Acts 1986, No. 211, section 2.

California Labor Code section 5305.

> The Appeals Board has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of the state at the time of the injury.

California Public Resources code section 6871.2
Lands excluded from lease; application of section.

Except as provided in section 6872 and 6872.1 of this Code, the commission shall not enter into any lease for the extraction of oil and gas from state-owned tide and submerged lands within the areas to which this section is applicable.

The provisions of this section shall be applicable only to the lands within the following described areas, but shall not be construed so as to prohibit operations or activities under any state oil and gas leases of any portion or portions of the tide and submerged lands to which this section is applicable and which leases are in effect on January 1, 1955, nor to prohibit renewals or extensions of any such leases in accordance with the provisions thereof.

(a) All those tide or submerged lands situated in the areas of the County of Los Angeles described as follows:

. . . .

Area No. 2: The tide and submerged lands surrounding the islands of San Clemente and Santa Catalina waterward of the ordinary high water mark of the Pacific Ocean on such islands to a distance of three nautical miles therefrom.